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No. 94-1471

In The

Supreme Court of the United States

October Term, 1994

Varity Corporation,
Petitioner,
v.

Charles Howe, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AS *AMICI CURIAE* OF EASTMAN KODAK COMPANY, ROCKWELL INTERNATIONAL CORPORATION, TURNER BROADCASTING SYSTEM, INC., AND W. R. GRACE & CO. IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici are corporations located throughout the United States that sponsor employee benefit plans subject to the Employee Retirement Income Security Act of 1974 ("ERISA"). The decision of the Court of Appeals in this case concerns *amici* because it expands plan sponsors' potential liabilities and costs of litigation by holding that

employees may be able to recover, through a claim for breach of fiduciary duty, benefits to which they would not be entitled under the terms of an employee benefit plan. Moreover, the decision imposes broad and ill-defined fiduciary duties on plan sponsors to advise employees of corporate decisionmaking and actions that may affect employee benefits.

The Court of Appeals observed that its holding would serve to remedy "an egregious wrong" in this case. *Amici* are concerned, however, that, unless reversed by this Court, the decision below will expose them to likely litigation and possible liability under ERISA for business decisions and actions that are neither egregious nor wrong but are properly undertaken in the interests of their shareholders. Accordingly, *amici* request that the Court consider their views on the important questions presented by this petition.[1]

SUMMARY OF ARGUMENT

The Court of Appeals held that petitioner had breached a fiduciary duty by making misleading statements to employees about corporate changes that affected their employee benefits and that respondents could recover individual relief for such a breach through a cause of action asserted under § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3).

[1] This brief is filed with the consent of the parties. Their letters of consent have been filed with the Clerk of the Court with this brief.

The Court of Appeals erred in holding that individual relief could be recovered on a claim for breach of fiduciary duty. Section 409 of ERISA, 29 U.S.C. § 1109, which defines liability for breach of fiduciary duty under ERISA, has been definitively construed by this Court as authorizing only plan-wide, not individual, relief. In reading the general provision of § 502(a)(3) as authorizing individual relief for breach of fiduciary duty, the Court of Appeals effectively rendered meaningless the preclusion of such relief in § 409(a).

The Court of Appeals also erred in holding that the communications at issue were made by petitioner in a fiduciary capacity. An employer does not act in a fiduciary capacity when making decisions about future changes to an employee benefit plan, and ERISA's fiduciary duty provisions should not be read, inconsistently with ERISA's express disclosure rules, to require premature disclosure of consideration of such changes.

Because the Court of Appeals erred both in finding a breach of fiduciary duty and in awarding individual relief for such a breach, its judgment should be reversed.

ARGUMENT

I. Remedies for Breach of Fiduciary Duty Should be Limited to Plan-Wide Relief

The first question presented by the petition is whether ERISA permits plan participants and beneficiaries to obtain relief on their own behalf for a breach of fiduciary duty. In

holding that ERISA does permit such relief, the Court of Appeals erred, and its decision should be reversed.

In enacting Title I of ERISA, Congress declared it national policy "to protect . . . the interests of participants in employee benefit plans" by, among other things,

> . . . establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

ERISA § 2(b), 29 U.S.C. § 1001(b). To implement this policy, Congress created a "commodious[]" statutory definition of fiduciary status "with respect to a plan" and imposed on those who meet that definition strict standards of conduct drawn mainly from principles of trust law. *John Hancock Mutual Life Ins. Co. v. Harris Trust & Savings Bank,* 114 S. Ct. 517, 524 (1993); ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). *See generally* ERISA §§ 404-07, 29 U.S.C. §§ 1104-07; *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989); *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-332 (1981).

Congress also included in ERISA a set of interlocking provisions specifically designed to provide for the enforcement of these federal fiduciary standards. Central to this enforcement structure is § 409, captioned "Liability for breach of fiduciary duty," which defines the remedies available for a breach of fiduciary duty. Section 3(21)(A)'s definition of fiduciary status as "with respect to a plan" is

echoed in § 409's limitation of its remedies to plan-wide relief. Section 409 provides, in part:

> (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

To effectuate these remedies, Congress enacted § 502(a)(2), 29 U.S.C. § 1132(a)(2), which authorizes a cause of action to obtain "appropriate relief under Section 409." Congress also provided in § 413, 29 U.S.C. § 1113, a statute of limitations which is the only express statute of limitations in Title I of ERISA and which specifically governs actions asserting a breach of fiduciary duty.

In short, ERISA provides a package of provisions unique to the enforcement of the fiduciary duties established by §§ 404-407, including the remedies provision of § 409, the cause of action provided by § 502(a)(2), and the statute of limitations in § 413. This carefully tailored enforcement structure has been previously reviewed by the Court in *Massachusetts Mutual Life Insurance Co. v. Russell* ("*Russell*"), 473 U.S. 134 (1985). *Russell* involved a claim brought by an ERISA plan participant seeking compensatory

and other damages under § 502(a)(2) for a fiduciary's alleged mishandling of her claim for plan benefits. The Court unanimously held that "appropriate relief under section 409," the only relief authorized in a § 502(a)(2) action, was limited to "remedies that would protect the entire plan" and did not permit individual remedies for participants or beneficiaries. *Id.* at 142. In support of this conclusion, the Court observed that "the principal statutory duties imposed" on fiduciaries under ERISA govern conduct with plan-wide impact, such as investment of plan assets, rather than conduct that affects benefit rights of individual plan participants and beneficiaries. *Id.*

Justice Brennan's concurring opinion in *Russell* noted that the Court had resolved only the question of whether individual damages were available in an action under § 502(a)(2) to obtain the remedies authorized in § 409. His opinion suggested, however, that individual damages would be available through an action under § 502(a)(3), which does not by its terms refer to § 409. *Russell*, 473 U.S. at 150.

Section 502(a)(3) authorizes a civil action by a participant, beneficiary, or fiduciary

> (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan or
>
> (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this subchapter or the terms of the plan;

Respondents in this case brought suit seeking, *inter alia*, to recover from petitioner[2] benefits to which they were not entitled under plan terms but to which they asserted they would have been entitled but for a breach of fiduciary duty. The Court of Appeals affirmed the district court's judgment awarding respondents under § 502(a)(3) the individual relief they sought on this claim. Following the reasoning of the *Russell* concurrence and stating that the "plain language" of § 502(a)(3) "certainly favors [respondents'] position" (App. 14a-15a), the Court of Appeals held that respondents could recover, through a claim for breach of fiduciary duty brought under § 502(a)(3), individual relief that would be unavailable through an otherwise identical claim asserted under § 502(a)(2). (App. 16a.)

The Court of Appeals was correct in observing that, if read in a vacuum, the language of § 502(a)(3) does not preclude awards of individual relief for a breach of fiduciary duty. Section 502(a)(3) -- and its companion provision, § 502(a)(5), 29 U.S.C. § 1132(a)(5), which provides a virtually identical cause of action to the Secretary of Labor -- authorizes a suit for equitable relief to remedy violations of plan provisions or of any provisions of Title I of ERISA. On the other hand, § 502(a)(3) is written in general terms and does not specifically authorize, or even refer to, claims for breach of fiduciary duty.

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[2] The sole petitioner in this Court is Varity Corporation ("Varity"). Original defendants in the case included Varity and its then-subsidiary Massey-Ferguson, Inc., which no longer exists as a separate entity. For the sake of convenience, this brief refers to the defendants collectively as "petitioner" or "Varity."

The question presented here is not whether the cause of action under § 502(a)(3) could, standing alone, be interpreted as providing individual relief for a breach of fiduciary duty but whether it should be so interpreted when such an interpretation would override § 409's preclusion of such relief. It is a well-recognized rule of statutory construction that

> [h]owever inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.'

Clifford F. MacEvoy Co. v. United States, 322 U.S. 102, 107 (1944), quoting *D. Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932). That rule is particularly appropriate where, as here, Congress has designed for the precise type of claim under consideration an "interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute'." *Russell*, 473 U.S. at 146, *quoting Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980).

Section 409 is unquestionably a provision specifically designed to define the scope of liability for breach of fiduciary duty. Indeed, § 409 is captioned "Liability for breach of fiduciary duty" and the definition of that liability is its sole function. The integrated provisions which Congress provided to govern and enforce ERISA's fiduciary standards, discussed *supra* at 4-5, provide strong evidence that Congress intended those provisions to be comprehensive

and exclusive; there is no indication in the statutory text, the legislative history or elsewhere that § 409's definition of this liability was intended to be otherwise.[3] To read § 502(a)(3) as providing a remedial alternative to § 409, as the Court of Appeals did, deprives § 409 of its intended exclusivity.

If individual relief for a breach of fiduciary duty could be obtained simply by asserting a claim under § 502(a)(3) rather than an otherwise identical claim under § 502(a)(2), then § 409's preclusion of individual relief would be rendered meaningless. Moreover, under such a reading, § 409's broad authorization of equitable relief for a breach of fiduciary duty -- and its specific authorization of the equitable remedy of restitution of improper fiduciary profits -- would be rendered superfluous, since that relief would merely duplicate the equitable relief available under § 502(a)(3).

In contrast, reading § 502(a)(3) as *not* encompassing claims for breach of fiduciary duty would not impair § 502(a)(3)'s effectiveness in providing remedies for violations either of plan provisions or of other statutory provisions. Rather, § 502(a)(3) would still fully serve its statutory function as a catch-all cause of action to enforce the many substantive provisions of Title I of ERISA that, unlike the fiduciary duty provisions, are not accompanied by specific enforcement provisions. For example, § 502(a)(3) provides the sole cause of action available to enforce § 510 of ERISA,

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[3] Indeed, the legislative history of ERISA supports the conclusion that Congress intended the plan-wide remedies provided in § 409 to be exclusive. *See Russell*, 473 U.S. at 140 and n.8.

29 U.S.C. § 1140, which prohibits, *inter alia*, actions taken for the purpose of interfering with the attainment of benefit rights. *See Teumer v. General Motors Corp.*, 34 F.3d 542, 544 (7th Cir. 1994); *Spinelli v. Gaughan*, 12 F.3d 853, 856 (9th Cir. 1993). *See also Uselton v. Commercial Lovelace Motor Freight, Inc.*, 940 F.2d 564, 582 (10th Cir.) (§ 502(a)(3) "grants plan participants and beneficiaries the right to bring a private action . . . to enforce ERISA's plan disclosure, funding, and administrative requirements"), *cert. denied*, 502 U.S. 983 (1991). None of these actions would be affected by a holding that § 502(a)(2) and § 409 provide the exclusive route for asserting claims for breach of fiduciary duty.

The potential conflict between § 502(a)(3) and § 409 cannot be resolved by characterizing the equitable relief available under § 502(a)(3) as merely supplementary to the relief available under § 409. Section 409's limitation on equitable relief to plan-wide relief would be superseded, not supplemented, if it could so easily be evaded by asserting a breach of fiduciary duty claim under § 502(a)(3) rather than under § 502(a)(2). In *Bulova Watch Co. v. United States*, 365 U.S. 753 (1961), the Court was asked to determine which of two Internal Revenue Code provisions governing the interest payable to a taxpayer on an overpayment would apply to petitioner's situation. *Id.* at 754. One provision specifically determined the allowance of interest on overpayments attributable to unused excess profits credit carry-backs and did not provide interest for the period prior to filing of a refund claim. The other provision related to interest on tax overpayments generally and did provide for interest during the pre-filing period. Citing the "familiar law that a

specific statute controls over a general one," the Court held that the specific provision controlled. *Id.* at 758. *See also Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228-29 (1957) (finding that a specific venue provision for patent infringement actions could not be supplemented by general federal venue provisions). Exactly the same analysis should apply here.

Beyond its reading of the "plain language" of § 502(a)(3), the Court of Appeals stated that it was following the reasoning of the concurrence in *Russell* that traditional trust law principles allowing individual relief for breach of fiduciary duty should be incorporated into ERISA. (App. at 15a.) While the Court has several times noted the connection between ERISA's fiduciary duty provisions and trust law principles (*see Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. at 110; *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport*, 472 U.S. 559, 570 (1985)), the Court has also declined to read ERISA as incorporating trust law *remedies* not specifically provided in the statutory text. *See Russell*, 473 U.S. at 144 (refusing to allow extra-contractual damages in a claim for breach of fiduciary duty); *Mertens v. Hewitt Assocs.*, 113 S. Ct. 2063, 2067-69 (1993) (refusing to allow a damage remedy as "equitable relief" against a non-fiduciary). Similarly here, because ERISA's statutory enforcement structure limits remedies for breach of fiduciary duty to plan-wide relief, trust law provides no basis for incorporation of additional remedies.

The Court of Appeals also stated that it was following the reasoning of the court in *Anweiler v. American*

Electric Power Service Corp., 3 F.3d 986 (7th Cir. 1993). (App. 16a.) In *Anweiler*, a panel of the Seventh Circuit reversed, in light of this Court's intervening decision in *Mertens v. Hewitt Assocs.*, the same panel's earlier decision that individual relief was *not* available on a claim for breach of fiduciary duty asserted under § 502(a)(3). As support for its reversal of position, the Seventh Circuit noted, without further explanation, that *Mertens* "clearly indicates the importance and availability of equitable relief." 3 F.3d at 993. *Mertens*, however, is hardly a decision that supports an award of individual relief for breach of fiduciary duty. To the contrary, *Mertens* emphasizes that ERISA does not automatically incorporate trust law remedies and directly rejects the position of the *Russell* concurrence that § 502(a)(3) provides a basis for awarding individual damages as relief for a breach of fiduciary duty.[4] *See Mertens*, 113 S. Ct. at 2070. In short, *Anweiler*'s reliance on *Mertens* is

[4] The *Anweiler* court also based its interpretation of *Mertens* on the fact that it was urged to do so by "the Secretary of Labor in an *amicus curiae* brief" and that "[t]he Secretary's interpretation of the law which he is authorized to enforce" merits deference. 3 F.3d at 993. However, the Secretary's *amicus* position regarding a private cause of action is entitled to no deference. "We have never applied the principle [of deference to agency interpretation] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice. To the contrary, we have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988), *citing Investment Company Institute v. Camp*, 401 U.S. 617, 628 (1971).

misplaced and does not support the holding of the Court of Appeals in this case.

Equally unpersuasive is the rationale of the other circuit decision holding that individual relief for a breach of fiduciary duty can be obtained under § 502(a)(3). *See Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292 (3d Cir. 1993). *Bixler* also relied primarily on the *Russell* concurrence and, although issued almost seven months *after* this Court's decision in *Mertens,* failed even to mention *Mertens* or to consider *Mertens'* impact.[5] *Bixler*, 12 F.3d at 1298-99. Accordingly, *Bixler* adds no support for the holding of the Court of Appeals in this case.[6]

Finally, the Court of Appeals observed that a holding that no individual relief was available on a claim for breach of fiduciary duty "would leave unredressed an egregious wrong." (App. 16a.) The court's desire to provide relief to respondents, however, cannot "engraft a remedy on a statute, no matter how salutary, that Congress did not intend to

[5] For example, *Bixler* cited favorably to circuit court decisions holding that a § 502(a)(3) cause of action permitted the recovery of monetary damages as "equitable relief" for a breach of fiduciary duty, failing to note that such decisions were effectively overruled by *Mertens*. *See Bixler*, 12 F.3d at 1300 n.17.

[6] Although the Court of Appeals did not discuss contrary authority from other circuits, two Courts of Appeal have squarely held that § 502(a)(3) does not authorize individual relief for a breach of fiduciary duty. *See McLeod v. Oregon Lithoprint Inc.*, 46 F.3d 956 (9th Cir. 1995); *Whisman v. Loran Robbins*, No. 93-3983/93-4030, 1995 U.S. App. LEXIS 13488, 1995 WL 324593 (6th Cir. June 1, 1995).

provide." *Russell*, 473 U.S. at 145, *quoting California v. Sierra Club*, 451 U.S. 287, 297 (1981). Moreover, the court's observation that respondents would otherwise be remediless is, at least, premature as applied to this case. Respondents' breach of fiduciary duty claim presented only one of three grounds on which the district court awarded judgment against petitioner; in light of its holding, the Court of Appeals expressly declined to address the other two grounds (estoppel and interference with benefit rights). (App. 17a n.5.) Accordingly, if this Court were to reverse the judgment, two independent bases for a remedy would remain to be addressed by the Court of Appeals.

Amici's concern with the Court of Appeals' decision goes beyond the flaws in its legal analysis. ERISA already has an express cause of action in § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), which allows participants and beneficiaries to enforce their rights to benefits provided by the terms of a plan. The practical impact of the Court of Appeals' decision is to create an alternative cause of action for benefits that would perversely parallel § 502(a)(1)(B) by authorizing recovery, through a claim for breach of fiduciary duty asserted under § 502(a)(3), of benefits *not* provided by a plan's terms. If this cause of action were allowed, every claim for benefits could, alternatively, be cast in the form of a claim for breach of fiduciary duty. Litigation of benefit claims would greatly expand and would focus not on whether a claimant was eligible for benefits but on whether the claimant's ineligibility could be shown to be the fault of someone alleged to be a fiduciary. Even if plan sponsors prevailed in the vast majority of these actions, the litigation costs alone would deter companies from establishing or

improving benefit plans, thus defeating what this Court has previously recognized as "the public interest in encouraging the formation of employee benefit plans." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987). *See also Mertens*, 113 S. Ct. at 2072.

Accordingly, in order to avoid circumvention of § 409's specific limitation on relief for breach of fiduciary duty to plan-wide relief and for the other reasons discussed above, this Court should reverse the decision of the Court of Appeals and hold that § 502(a)(3) does not provide a basis on which participants can obtain individual relief for a breach of fiduciary duty.

II. Employers Do Not Act as Fiduciaries in Communicating With Employees About Matters that Do Not Involve Plan Administration

The second question presented by the petition is whether petitioner breached a fiduciary duty when it failed to disclose to employees its expectation that their welfare benefits would be terminated. *Amici* urge the Court to resolve this question by reversing the judgment of the Court of Appeals on the ground that petitioner was not acting as a fiduciary in making the communications at issue. An employer that acts in a fiduciary capacity by administering an employee benefit plan does not thereby subject itself to ERISA's fiduciary duties in all of its dealings with employees that implicate the plan.

Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A), defines the term 'fiduciary' in functional terms rather than solely by reference to title or position. *See Mertens v.*

Hewitt Assocs., 113 S. Ct. at 2071. Thus, a person is a fiduciary with respect to a plan to the extent he performs one of the following functions that gives rise to fiduciary status under § 3(21)(A): 1) exercising discretionary authority or control over plan administration or management; 2) exercising any authority or control respecting management or disposition of plan assets; or 3) rendering investment advice for a fee regarding plan assets.

While fiduciary status is broadly defined in ERISA, the definition is not unlimited. Section 3(21)(A) also provides that a person is a fiduciary only "to the extent" of the fiduciary function performed. Courts have consistently interpreted this limitation as meaning that fiduciary status under ERISA is not "an all-or-nothing concept". *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 61 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1051 (1993). *See also Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan*, 24 F.3d 1491, 1498 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1099 (1995); *Belade v. ITT Corp.*, 909 F.2d 736, 738 (2d Cir. 1990).

Thus, it is entirely possible -- and extremely common in the case of employers that sponsor single-employer plans -- for an employer to act both in fiduciary and non-fiduciary capacities with respect to the same plan. Many employers choose, for reasons of cost and administrative efficiency, among others, to perform the fiduciary function of discretionary administration of some or all of the plans they sponsor. Indeed, ERISA expressly contemplates that employers and their officials may act in fiduciary capacities

with respect to employee benefit plans. *See* ERISA § 408(c) (3), 29 U.S.C. § 1108(c)(3).

The courts have also consistently recognized that certain decisions made by employers are not subject to fiduciary standards even if these decisions have direct and significant impacts on employee benefit plans. In *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223, 1228 (1995), the Court recognized this principle by stating that "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans," and quoting from *Adams v. Avondale Industries, Inc.*, 906 F.2d 943, 947 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990) for the proposition that "a company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefit plan." Similarly, the circuit courts have uniformly recognized a category of "plan design" decisions -- *i.e.*, decisions to establish, terminate, or amend employee benefit plans -- which are "business" or "settlor" decisions that an employer is free to make in its own interests without being subject to ERISA's fiduciary standards. *See, e.g., McGath v. Auto-Body North Shore, Inc.*, 7 F.3d 665, 670-71 (7th Cir. 1993); *United Paperworkers Int'l Union v. Jefferson Smurfit Corp.*, 961 F.2d 1384, 1386 (8th Cir. 1992). Employers that act in fiduciary capacities with respect to employee benefit plans are characterized as wearing "two hats": one in carrying out business activities which do not fall within one of the fiduciary functions defined in § 3(21)(A) and to which ERISA's fiduciary standards do not apply, and the other in carrying out a fiduciary function, typically plan administration, to which fiduciary duties fully apply. *See, e.g., Joseph*

Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan, 3 F.3d 994, 1001-02 (7th Cir. 1993) (collecting cases), *aff'd on other grounds*, 115 S. Ct. 981 (1995).

The Court of Appeals in this case recognized the general applicability of these principles and observed that:

> It is true that not every business decision made by a fiduciary will subject it to liability for breach of fiduciary duty. . . . Defendants' decision to create MCC and to transfer certain assets to it, for example, was not by itself a violation of ERISA. It may have been unwise or bad business, but that is not the same thing as a breach of fiduciary duty.

(App. 12a-13a.) The court stated, however, that the communications by petitioner to its employees that formed the basis of the breach of fiduciary duty claim were not "mere business decisions on the part of defendants." (App. 13a.) Apparently having concluded by that statement that petitioner's communications to employees were made in a fiduciary capacity, the Court of Appeals also concluded that the communications constituted a breach of fiduciary duty.

The principal authority cited by the Court of Appeals in connection with its conclusion that petitioner's communications were made in a fiduciary capacity was *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154 (6th Cir. 1988). *Berlin* was the first in a line of circuit court decisions which, like the decision in this case, held that employers that also act as plan administrators have fiduciary duties to disclose to participants information about potential changes in employee

benefit plans.[7] All of these cases were brought by former employees who terminated employment before some significant improvement in the benefits under their employee benefit plans for which they could have been eligible if they had not terminated employment. Their common allegation was that the employer had breached a fiduciary duty by failing to disclose to employees the possible improvement in benefits. The courts that have recognized such a claim have stated that, although an employer need not generally disclose its internal deliberations and is not held to a "duty of clairvoyance" in predicting future changes, the employer breaches a fiduciary duty if it fails to disclose, at least in response to employee inquiries, such prospective changes when they are under "serious consideration." *See Berlin*, 858 F.2d at 1163; *Fischer*, 994 F.2d at 135.

There is no question that an employer which acts as a plan administrator is subject to fiduciary duties while acting in that capacity. Fiduciary duties in plan administration, however, require only that the fiduciary administer the plan pursuant to its current terms. As this Court recently observed in *Curtiss-Wright*, 115 S. Ct. at 1230, one of

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[7] *See also Mullins v. Pfizer, Inc.*, 23 F.3d 663 (2d Cir. 1994); *Fischer v. Philadelphia Electric Co.*, 994 F.2d 130 (3d Cir.), *cert. denied*, 114 S. Ct. 622 (1993); *Drennan v. General Motors Corp.*, 977 F.2d 246 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 2416 (1993). Other appellate decisions, however, have rejected the proposition that an employer has a fiduciary duty to disclose future plan changes. *See Barnes v. Lacy*, 927 F.2d 539, 544 (11th Cir.), *cert. denied*, 502 U.S. 938 (1991); *Young v. Standard Oil*, 849 F.2d 1039, 1045 (7th Cir.), *cert. denied*, 488 U.S. 981 (1988).

ERISA's "core functional requirements" is found in § 402(a)(1), 29 U.S.C. § 1102(a)(1), which requires that every employee benefit plan be "established and maintained pursuant to a written instrument." Section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), imposes on fiduciaries the duty to act in accordance with the lawful terms of that instrument and other current governing documents. Similarly, the statutory disclosure requirements imposed on the plan "administrator", a term defined in § 3(16)(A), 29 U.S.C. § 1002(16)(A), require disclosure of the current terms of the plan.[8] Notably absent from these provisions is any requirement for disclosure of plan changes that have not yet been implemented, much less of potential changes that are merely under consideration.

Moreover, as discussed above, an employer, regardless of whether it also acts as plan administrator, is not subject to ERISA's fiduciary duties in making decisions about future plan terms. If, as the case law consistently holds, a corporate plan sponsor is entitled to make plan

[8] Thus, provisions of part 1 of Title I of ERISA require that the administrator furnish to participants and beneficiaries, both initially and at five-year intervals, an understandable summary of the plan's current terms. *See* §§ 102(a), 104(b)(1), 29 U.S.C. §§ 1022(a), 1024(b)(1). Participants must also receive, within prescribed time periods, summaries of any material modifications to these terms. *See* § 104(b)(1), 29 U.S.C. § 1024(b)(1). In addition, a plan administrator is required, at the risk of incurring penalties, to make available for inspection by participants and beneficiaries the full text of the plan's current governing documents and to furnish copies of these documents on request. *See* §§ 104(b)(2), (4), 502(c), 29 U.S.C. §§ 1024(b)(2), (4), 1132(c).

design decisions entirely in its own interest and without regard to ERISA's fiduciary standards, then there is no reason why an ERISA fiduciary duty should attach to require disclosure of corporate consideration of these decisions.

In holding that petitioner was subject to ERISA's fiduciary standards in communicating to employees about future changes that could affect their employee benefits, the Court of Appeals blurred the clear line drawn by the case law between an employer's fiduciary and non-fiduciary functions with respect to a plan. Because ERISA defines fiduciary status in functional terms, a determination of whether petitioner was acting in a fiduciary capacity can only be made by examining the communications at issue in this case. The Court of Appeals' opinion reflects that Varity decided to transfer unprofitable business operations to a newly-formed subsidiary. (App. 2a-3a.) In order to induce employees who worked in these business operations to transfer to the new subsidiary, Varity made representations to the employees, *e.g.*, that "the new company had a bright future," that it knew were inaccurate. (App. 3a.) Varity communicated only "very limited" information regarding employee benefits, including a chart showing that the benefits offered by the old and new employers would be identical and a statement that "benefit programs will remain unchanged" as a result of the transfer. (App. 4a.) In addition, Varity officials did not include in question and answer sheets distributed to employees any information about "certain questions that they knew the employees wanted answered" relating to eligibility for severance and early retirement benefits from the old employer. *Id.* Varity also

did not repeat its previous disclosure that it had reserved the right to modify or terminate benefits in the future.

Whatever other characterization is made of Varity's communications, they were not made in the course of plan administration. Rather, they all derived from Varity's role as an employer communicating with employees about its restructuring of business operations and attempting to induce employees to transfer their employment to the new subsidiary. The fact that Varity also administered its ERISA plans was fortuitous and should have been irrelevant to the court's legal analysis. If Varity's employee benefit plans had been administered by an entirely unrelated entity, that entity presumably would not have known of Varity's future expectations and could not have disclosed them or breached a duty by failing to disclose them. Varity, on the other hand, would likely still have made the same types of employee communications in order to serve its perception of its corporate interests as reflected in the court's opinion.[9]

In addition to its citation to *Berlin,* the Court of Appeals cited to two other decisions holding that ERISA fiduciaries owe duties of disclosure to individual plan

[9] Indeed, Varity's communications essentially related to the business prospects of its new subsidiary and were even further removed from plan administration than the communications at issue in *Berlin* and similar cases involving disclosure of future plan changes. According to the Court of Appeals' opinion, Varity was not so much anticipating future changes in its employee benefit plans as it was anticipating that the new subsidiary would fail, one consequence of which would be an inability to continue employee benefits.

beneficiaries, *Rosen v. Hotel & Restaurant Employees & Bartenders Union*, 637 F.2d 592 (3d Cir.), *cert. denied*, 454 U.S. 898 (1981), and *Eddy v. Colonial Life Insurance Co. of America*, 919 F.2d 747 (D.C. Cir. 1990). Both *Rosen* and *Eddy*, however, were suits against defendants -- respectively, a board of plan trustees and an insurer acting as a discretionary plan administrator -- that were unquestionably acting in fiduciary capacities in dealing with plan beneficiaries. Both decisions invoked the trust law principle that a fiduciary owes disclosure duties to a beneficiary regarding matters relevant to the fiduciary-beneficiary relationship. *See Rosen*, 637 F.2d at 600 n.11 (quoting Restatement (Second) of Trusts § 173 (1959)); *Eddy*, 919 F.2d at 750-51 (same).[10] This case, in contrast, involves disclosures arising from an employer-employee relationship, a relationship not, as such, subject to ERISA's fiduciary standards.

The Court of Appeals also expressed its desire to provide some remedy for respondents. As discussed *supra* at 13-14, this desire alone is insufficient reason to depart from ERISA's statutory scheme, and, in any event, other grounds for a remedy have also been asserted in this case.

[10] Because this case can and should be resolved by holding that Varity did not act as a fiduciary when communicating with its employees, this Court need not decide whether those who are communicating in a fiduciary status should be held to standards beyond those expressly imposed by part 1 of Title I of ERISA. In *Curtiss-Wright*, the Court distinguished the "thorough" disclosure scheme contained in part 1 from the fiduciary responsibility provisions contained in part 4 and observed that "we do not think Congress intended it to be supplemented by a far-away provision in another part of the statute." 115 S. Ct. at 1231.

Moreover, the disclosure duty mandated by the Court of Appeals in this case and articulated more fully in decisions such as *Berlin* and *Fischer* would be likely to prove simultaneously unworkable for employers and unhelpful to employees in general.

While the Court of Appeals found it unnecessary, in light of the facts of this case, to discuss in any detail the scope of required disclosures, the line of cases emanating from *Berlin*, the principal authority relied on by the Court of Appeals, holds that potential plan changes must be disclosed once they are under "serious consideration" by the plan sponsor. *Berlin*, 858 F.2d at 1164. It is no accident that these disclosure issues have arisen most frequently in recent years at companies that have implemented early retirement or "window" plans that provide employees with enhanced retirement or severance benefits if they retire during a specified "window" period. *See id.* at 1157; *Fischer,* 994 F.2d at 132; *Mullins*, 23 F.3d at 665; *Drennan*, 977 F.2d at 248-49. Typically, these plans are adopted by companies that want to "downsize" or reduce the number of their employees. Adoption of enhanced benefit plans allows these companies to avoid layoffs and to reduce their workforce in a way that is simultaneously beneficial to the departing employees and protective of the companies' interests in avoiding or minimizing litigation over the terminations and maintaining the morale of the remaining workforce by showing that the company treats departing employees well.

Nothing in ERISA, of course, requires plan sponsors to adopt such enhanced benefits, and the financial circumstances of employers, including their ability to afford

enhanced benefits, varies from one employer to the next and can change rapidly even for a given employer. Thus, companies may give "serious consideration" to a wide range of alternatives that may, in different ways, affect employee benefits, including outright layoffs, divestitures, window plans, and continuation of the status quo. Disclosure of such a broad and general range of alternatives is unlikely to prove helpful in any respect to participants.

The more narrowly the companies' options are focused, the more helpful disclosure of those options could be to participants, at least if they have any ability to make benefit choices that could be affected if a particular option were pursued. Yet, until a decision is actively made and implemented, there is no assurance as to what option will be chosen, and employees could well be making choices based on disclosures that turned out, in retrospect, to be accurate but misleading. For example, a company could disclose its anticipated establishment of a window plan only to have its financial situation deteriorate so that layoffs became the only viable alternative; employees who had remained employed in anticipation of an enhanced benefit would not have benefited from the premature disclosure, especially if they had foregone benefit choices that were no longer available to them.

Moreover, the rationale adopted by the Court of Appeals is not limited to disclosure of major plan changes, such as the window plans at issue in *Berlin* and similar cases. Employers frequently amend their medical plans by adding, deleting or modifying provisions for coverage of particular medical treatments. A plan participant or benefi-

ciary disadvantaged by such an amendment -- or one who would have benefited from such an amendment if it had been implemented earlier -- could, under the Court of Appeals' decision, always sue to obtain the more favorable coverage on the theory that it was a breach of fiduciary duty not to disclose prior "serious consideration" of the amendment.

While disclosure of potential benefit changes may or may not prove helpful to employees, it would certainly intrude on an employer's ability to manage its business operations consistently with the corporate fiduciary duties owed to its shareholders. Employers have numerous reasons not to make premature disclosure of matters relating to their future business activities, including maintaining secrecy from competitors and avoiding disruption of their workforce by announcing possible developments that may never come to pass.

In short, a rule requiring disclosure of every corporate alternative affecting benefit plans that was under "serious consideration" would prove unworkable and would promote more litigation than it avoided or resolved. More importantly, it is not the rule that Congress envisioned in enacting ERISA's fiduciary and disclosure provisions. Rather, ERISA contemplated that fiduciary and disclosure duties attach to administration of a plan but not to matters involving possible changes to, or indirect effects on, the plan. Because the Court of Appeals' decision imposes fiduciary status and duties on employers well beyond the bounds intended by the statute, it is in error and should be reversed by this Court.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to reverse the decision of the Court of Appeals.

Respectfully submitted,

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